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Supreme Court, U.S.
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No. 03-16

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner's case squarely implicates a deep circuit split over the degree to which district courts may consider circumstances arising since a defendant's original sentencing when resentencing that defendant. The government concedes that a split exists but tries to minimize it and describes this case as a poor vehicle for its resolution. In fact, at least ten courts of appeals have weighed in on this critical issue with irreconcilable rules for resentencing courts. And none of the government's proposed reasons for deferring this case to a later day provides any logical grounds for delay.

This case also presents an intractable circuit conflict over the question of whether 18 U.S.C. § 1014 criminalizes false statements that do not relate to lending transactions. The Seventh Circuit held that it does, but acknowledged that this position is diametrically opposed to that of the Fifth Circuit. Other circuits have since taken the Seventh Circuit's position. This Court should grant certiorari to correct the resulting disparate treatment of criminal defendants in different parts of the country and to resist federal encroachment on the traditional state prerogative of fraud prosecution.

I. The Courts Of Appeals Are Deeply Divided Over District Courts' Authority To Consider Defendants' Changed Circumstances At Resentencing.

The petition describes a recognized circuit split over the scope of district courts' authority in resentencing criminal defendants. See Pet. 9-16; *United States* v. *DeRiggi*, 893 F. Supp. 171, 180-181 (E.D.N.Y.) (observing circuit split), aff'd, 72 F.3d 7 (2d Cir. 1995) (per curiam). Petitioner showed, specifically, that federal appellate courts have adopted inconsistent rules as to a resentencing court's power to consider ways in which a defendant's circumstances have changed since his original sentencing.

The government does not dispute that the Fourth, Eighth, and Tenth Circuits categorically forbid district courts to consider changed circumstances at resentencing. See Pet. 9-10; see, *e.g.*, *United States* v. *Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994) (even at "fully de novo resentencing," court may only consider "relevant evidence the court could have heard at the first sentencing hearing"). The government claims, however, that some of the decisions petitioner cites on the other side of the split—cases giving district courts broad authority to consider changed circumstances at resentencing—are inapposite because they did not involve *remands* for resentencing or expressly *limited* remands, specifically. See Br. in Opp. 15-16. But this misses the point. The decisions that the government challenges announce sweeping principles about courts' sentencing power and the fairness of considering new facts at resentencing—principles that are not limited to a particular procedural context.

Foremost is the longstanding principle that sentencing is the duty of the trial court, requiring consideration of all the facts and circumstances at the time of sentencing. See *United States* v. *Core*, 125 F.3d 74, 77 (2d Cir. 1997) ("When the trial court undertook to resentence [the defendant] * * * , it was required to consider him as he stood before the court at that time"); accord *Werber* v. *United States*, 149 F.3d 172, 178 (2d Cir. 1998). This idea is reflected in the Sentencing Guidelines, which permit consideration of any factor for which consideration is not expressly barred. See *United States* v. *Rudolph*, 190 F.3d 720, 723 (6th Cir. 1999) (relying on *Koon* v. *United States*, 518 U.S. 81 (1996), for proposition that district courts retain discretion to consider anything—including changes since original sentencing—that Sentencing Commission and Congress do not proscribe); accord *United States* v. *Bryce*, 287 F.3d 249, 253 (2d Cir. 2002).

From this foundation emerges the principle that changed circumstances should not be ignored by a district court in

resentencing a defendant. See *Rudolph*, 190 F.3d at 724 ("'It makes no sense to preclude a sentencing judge from considering facts pertinent to resentencing that had not yet arisen at the time of the original sentence'"); *United States* v. *Sally*, 116 F.3d 76, 80-81 (3d Cir. 1997) (recognizing that under *Koon*, changed circumstances can support sentencing departure); *Puente* v. *United States*, 676 F.2d 141, 145 (5th Cir. 1982) (explaining that "'it is a common practice in resentencing to take into consideration events and conduct occurring subsequent to the original sentence'").

In contrast, the rule in the Fourth, Eighth, and Tenth Circuits appeals to a different principle: that sentencing disparities among similarly situated defendants should be avoided. See *United States* v. *Sims*, 174 F.3d 911, 912 (8th Cir. 1999) ("[Allowing consideration of post-sentencing conduct] creates a situation in which a few lucky defendants, simply because of a legal error in their original sentencing, receive a windfall"). The majority view, however, questions whether this principle is even at stake. See *United States* v. *Rhodes*, 145 F.3d 1375, 1381 (D.C. Cir. 1998) ("The [Guidelines] seek[ ] to eliminate not *all* sentencing disparities, but only 'unwarranted' disparities. Distinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems 'unwarranted'" (citations omitted)); see also *United States* v. *Bradstreet*, 207 F.3d 76, 82-83 (1st Cir. 2000) (following *Rhodes*); *Rudolph*, 190 F.3d at 724 ("Similarly-situated defendants receive identical sentences, but the comparison cannot persist after a judicial determination that the defendant merits *resentencing*"). In short, in both rationale and application, the courts of appeals are split on the propriety of considering changed circumstances in resentencing.[1]

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[1] Indeed, two Second Circuit decisions the government attempts to distinguish expressly adopt the broad principle that district courts can consider changed circumstances *even following an explicitly limited remand*. See *United States* v. *Quintieri*, 306 F.3d 1217, 1230 (2d Cir.

Ultimately, the government concedes, as it must, that the Seventh Circuit's decision in this case does implicate a circuit split (although the government tries to characterize it as somehow limited to the Second and Seventh Circuits). See Br. in Opp. 16-17. The government cites four reasons why this Court should nevertheless decline to resolve the conflict, but none of these reasons is grounds for denying the petition.

First, the government claims that the question presented only implicates cases where "a court of appeals remands for imposition of a sentence within a particular Guidelines range." Br. in Opp. 17. In fact, however, adopting the majority rule that petitioner espouses would abrogate the rule the Fourth, Eighth, and Tenth Circuits, all of which prohibit courts from considering changed circumstances no matter how broad the remand. The courts openly disagree on a resentencing court's authority to consider changed circumstances. A statement from this Court would affect the vast run of cases in which defendants are resentenced following an appeal or collateral challenge, not merely those cases involving a limited remand.

Second, the government contends that the conflict is "insufficiently developed." Br. in Opp. 17. As explained above and in the petition, however, the split is substantial; three circuits follow a strict rule limiting judicial discretion at resentencing, and six others recognize resentencing courts' power to consider the defendant as he is, including any recent changes. See Pet. 13-14. Nor was the Seventh Circuit's decision in this case anomalous or unrepresentative of that court's approach, as the government suggests. See Br. in Opp.

2002) (resentencing court can consider changed circumstances "following remand even though the remand was 'limited' to a different issue"), cert. denied, 123 S. Ct. 2246 (2003); *Bryce*, 287 F.3d at 253 ("'even where the appellate court remands a case with specific limiting instructions, such a mandate does not "preclude" a departure based on intervening circumstances'").

17-18. As described more fully in the petition (at 10-11), the Seventh Circuit's hybrid approach allows resentencing courts to consider changed circumstances unless they involve issues already resolved in a prior appeal. The court of appeals thus allowed petitioner to argue changed medical circumstances at one point, as the government recognizes (at 17), because that court had yet to address a medical departure in the case. Here, in contrast, the Seventh Circuit denied the district court's authority to consider changed circumstances because that basis for departure was the subject of an earlier Seventh Circuit decision. In short, the court of appeals' decision in this case reflects the court's established rule and squarely implicates the circuit split described in the petition.

Third, the government urges the Court to avoid the question presented until lower courts have had a chance to interpret statutory changes made by the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003. See Br. in Opp. 18. As explained in the petition, however, the Act does nothing to resolve the split over courts' ability to consider changed circumstances at resentencing. See Pet. 14 n.7. The relevant portion of the Act, and its legislative history, show that it was intended to bar district courts from resurrecting sentencing departures, reversed on appeal, under the guise of new legal theories. *Id.* It says nothing about intervening factual changes, as one would expect if Congress intended to resolve the circuit split on this issue. *Id.* In short, the Act is no reason to delay this Court's resolution of an important issue dividing the lower courts.

Finally, the government urges the Court not to resolve this issue because "petitioner would not be entitled to relief even under the rule he asks this Court to adopt." Br. in Opp. 18. But the Seventh Circuit refused to address petitioner's appeal solely because the court believed that the district court was powerless to consider changed circumstances in any event. A ruling from this Court in petitioner's favor would entitle him to the review

he seeks from the Seventh Circuit. Nor would this be an empty exercise. As the petition explains, petitioner has a compelling claim that the district court misunderstood the scope of its discretion by misreading a previous appellate ruling. See Pet. 4-7. Far from following the Seventh Circuit's prior decision, as the government claims (at 19), the district court misread it to conflate two distinct grounds for departure in the Guidelines. Pet. 7. The sentencing court thus erroneously concluded that it had no authority to depart downward notwithstanding petitioner's rapidly declining health—including a life-threatening heart condition that continues to deteriorate.[2] Pet. 4-7. In a circuit adhering to the majority view, the court of appeals would have reviewed this claim on its merits.[3]

II. The Courts Of Appeals Are Deeply Divided Over The Application Of 18 U.S.C. § 1014 To Activities Not Involving Loans Or Credit Applications.

The federal bank fraud statute governs false statements made in "loan and credit applications" to federally insured banking institutions. 18 U.S.C. § 1014 ("Loans and credit applications generally; renewals and discounts; crop insurance"). Petitioner, however, was convicted for activities that involve neither a loan nor a credit application, a result that the Fifth Circuit would reject under *United States* v. *Devoll*, 39 F.3d 575, 580 (1994). The brief in opposition does not dispute the petition's showing that, as a result of the government's

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[2] Petitioner has had three cardiac episodes, one as recently as September 2003, since his last sentencing hearing. All three episodes resulted in petitioner's hospitalization.

[3] As the government itself has recently argued, "[t]he possibility that the court of appeals might arrive at the same judgment after a remand is not a reason for this Court to decline to resolve the important circuit conflict that is squarely presented." Amicus Br. of the United States, *Yates* v. *Hendon*, No. 02-458, at 20 n.7 (May 2003).

expanded invocation of Section 1014, the question presented is important and frequently recurs. The uncertainty regarding the scope of such an important criminal statute is untenable. See Modern Federal Jury Instructions ¶ 37.03 (recognizing "uncertainty as to the scope of section 1014" resulting from the conflict between the decision in this case and the Fifth Circuit's holding in *United States* v. *Devoll*, 39 F.3d 575, 580 (1994)). Nor does the government dispute that the question raises a fundamental issue regarding the balance between federal and state criminal authority, for fraud on a trust is squarely within the domain of state criminal law and prosecution in a context like this one implicates no federal interest.[4] The government's arguments for nonetheless denying certiorari lack merit, and rely primarily on mischaracterizations of the facts of this case and the Fifth Circuit's holding in *Devoll*.

Petitioner, in his construction business, used traditional "municipally sponsored debt instruments known as Industrial Revenue Bonds (IRBs)." Br. in Opp. 2. The banks' funds were indisputably never at risk, because the banks merely served as "the trustee banks for the bond proceeds"; they "held the money and invested it in an interest-bearing account." *Id.* at 3. As the court of appeals explained, "[f]rom the interest earned on the proceeds, the investors were paid a set rate of return, and any *excess amounts, referred to as 'arbitrage,' could be used by the developer* for costs directly related to the project." Pet. App. 19a (emphasis added). The theory of the prosecution was thus that "[p]etitioner caused false invoices and certifications to be submitted to the trustee banks *to obtain arbitrage funds* for

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[4] The petitions in this case and No. 03-44, *Sabri* v. *United States* (involving bribery prosecutions under 18 U.S.C. § 666) present this Court with a unique opportunity to confront the recurring issues regarding the scope of federal criminal law in areas traditionally regulated by the states. See Pet. 19 n.10; Amicus Br. of National Ass'n of Criminal Defense Lawyers, *Sabri*, at 4. Both petitions will be considered by the Court at its October 10, 2003 cconference.

impermissible purposes." Br. in Opp. 4 (emphasis added). Petitioner was nonetheless convicted because a divided panel of the Seventh Circuit in this case expressly rejected the Fifth Circuit's holding in *United States* v. *Devoll*, 39 F.3d 575, 580 (1994), that individuals may be prosecuted for bank fraud under Section 1014 only for conduct involving lending activities. Pet. App. 19a (citation omitted); see also *United States* v. *Boren*, 278 F.3d 911, 916 (9th Cir. 2002) (recognizing that *Devoll* holds that Section 1014 applies "only to lending activities").

Given this explicit recognition, the government's various attempts to minimize the conflict lack merit. (The government's arguments on the merits fail for the reasons set forth in the petition.) *First*, the government says (at 11) that *Devoll* arose in the context of the defendant's argument "that the district court committed plain error in failing to instruct the jury that such a connection was an element of the offense." That is true, but irrelevant. As the government admits, "the court of appeals [in *Devoll*] *held* that the district court [in that case] had committed error, because 'section 1014 applies only to actions involving lending transactions.'" *Id.* at 11 (quoting 39 F.3d at 580) (emphasis added); see 39 F.3d at 580 ("We *hold* today that section 1014 relates only to lending activities by financial institutions") (emphasis added). The Fifth Circuit in *Devoll* simply applied that holding to further conclude that the jury instructions in that case were required to conform to the limits on Section 1014's scope. 39 F.3d at 579-80.

Second, the government asserts, with no rationale whatsoever, that the facts of petitioner's case are "peculiar." Br. in Opp. 12. This case would be dismissed *a fortiori* in the Fifth Circuit under *Devoll*, in which the defendant defrauded banks with numerous false statements that he intended to take over the banks and, as one consequence, acquired cars on bank drafts drawn on the banks. At least in *Devoll*, unlike this case, the banks' own funds were at risk.

Third, the government says that the *Devoll* opinion "suggests" that the Fifth Circuit "was principally concerned with avoiding Section 1014's application to 'fraud or false representations having nothing to do with financial transactions.'" Br. in Opp. 12 (quoting *Devoll*, 39 F.3d at 580). That quotation, however, simply states one of several reasons the Fifth Circuit held as it did, for that court recognized the almost limitless breadth of the government's theory (which the Seventh Circuit accepted in this case), that Section 1014 applies to essentially every misrepresentation to a bank. The government's suggestion (at 12) that the Fifth Circuit might limit *Devoll* to "fraud in an employment contract" or contracts for "custodial care, premises repair, or renovation" is transparently silly in light of the facts of *Devoll* itself, which involved nothing of the kind.

Fourth, the government says (at 12) that there has not been a case in which "a court of appeals has reversed a conviction or affirmed the dismissal of an indictment" under *Devoll*. But as the petition stated, there are no further holdings applying *Devoll* for the simple reason that the government in that circuit is forbidden from bringing Section 1014 prosecutions outside the context of lending transactions by financial institutions. Pet. 8-9, 19. Indeed, the government is unable to point to a single indictment it has brought in the Fifth Circuit applying the theory it employed in this case.

Fifth, the government admits that neither bank was "itself the lender," yet asserts that it could have prosecuted petitioner consistent with *Devoll* because this case "does involve borrowed funds (*i.e.*, funds that were borrowed from the issuers of the IRBs)." Br. in Opp. 12. But this is a *bank* fraud prosecution, not a generic fraud prosecution. The Fifth Circuit "hold[s] * * * that section 1014 relates only to lending activities *by financial institutions*" (39 F.3d at 580 (emphasis added)), which would be the end of the matter in that court of appeals.

Sixth, the government asserts (at 12) that, although neither bank was "itself the lender," each "took on financial exposure for improper release of the funds." This argument is a *non sequitur* because the banks' supposed "financial exposure" does not trigger the statute. The banks in *Devoll* faced the financial exposure of paying for the cars delivered to the defendant based on drafts from the banks.[5]

In any case, the government's newfound claim is also outrageous because it persuaded the district court to instruct the jury that "it makes no difference that * * * the bond holders * * * may have had civil remedies in the event of a default" or "whose money it was that was being disbursed" or "whether or not the bank was injured." Aug. 24, 1995 Tr. 2. The trial evidence established that the banks were *insulated* from liability. The trust documents immunize the banks for "acting upon any" disbursement request "believed to be genuine." Indenture of Trust 67 (Sept. 1, 1987). The one witness quoted by the government (at 10) admitted that, "under the terms of the bond documents," "the trustee [is] entitled to rely on the contractor's representations that are contained in the disbursement certificate and requisition." Aug. 25, 1995 Tr. 570-71. A trustee's obligation is to act in good faith; given that the premise of this prosecution is that the trustees were defrauded, they couldn't possibly be held liable. *E.g.*, *NC Ill. Trust Co. v. First Illini Bancorp.*, 752 N.E.2d 1167, 1176 (Ill. App. 2001) (in case alleging breach of trustee bank's duties, "[t]he presence of good faith and common prudence necessarily dictates the absence of a breach of fiduciary duty").

CONCLUSION

The petition for certiorari should be granted.

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[5] As a separate matter, the banks had no financial exposure for the loss of the bonds' tax status because the IRS ruled, *for reasons entirely unrelated to this case*, that the bonds were not tax-exempt.

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